93-905

No. _____

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

JOHN W. STRASBURG and
ELDERCARE ASSET PROTECTION PLANS, INC.,
Petitioners,

v.

STATE BAR OF WISCONSIN, GERALD C. STERNBERG, JOHN A. BOLZ, JOHN E. SHANNON, EDMUND MANYDEEDS III, JACQUELINE BOHMAN, WILBUR W. WARREN III, MICHAEL WHERRY, MICHAEL FAUERBACH, LISA LOTTE CAMELTOFT, PATRICIA GROVE, ROBERT J. KAY, CELIA SERAPHIM, and DIANE ZORE,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 9, 1993

57 pp

QUESTION PRESENTED

Whether, under the doctrine of finality for appealablity purposes and under the provisions of Rule 4(a)(2) of the Federal Rules of Appellate Procedure, the Court of Appeals erred in dismissing, for lack of appellate jurisdiction, the appeal below, taken by notice of appeal referring to an order granting summary judgment in favor of the only defendant served in the action?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The identity of the plaintiffs in the action before the District Court below corresponds exactly to the appellants before the Court of Appeals below.

The plaintiffs below were John W. Strasburg and ElderCare Asset Protection Plans, Inc. Both are petitioners in this Petition For Writ Of Certiorari. There are no parent corporations or entities of, or subsidiaries of, either wholly owned or owned in part by ElderCare Asset Protection Plans, Inc.

The complete list of defendants initially named in the District Court below is as follows: State Bar of Wisconsin, Board of Attorneys Professional Responsibility, Gerald C.

Sternberg, John A. Bolz, John E. Shannon, Edmund Manydeeds III, Jacqueline Bohman, Wilbur W. Warren III, Michael Wherry, Michael Fauerbach, Lisa Lotte Gameltoft, Patricia Grove, Robert J. Kay, Celia Seraphim, Diane Zore, and the Supreme Court of the State of Wisconsin. However, of all of these, service of process was only ever effected on Gerald C. Sternberg. Early dismissal by the District Court of the Board of Attorneys Professional Responsibility and the Supreme Court of the State of Wisconsin on immunity grounds was not appealed.

All of the other aforesaid defendants were denominated as appellees before the Court of Appeals on the appeal below. For this reason, they are all named as respondents in this Petition For

Writ Of Certiorari, in accordance wi^h Supreme Court Rule 19.6.

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In The
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JOHN W. STRASBURG and
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Petitioners,

v.

STATE BAR OF WISCONSIN,
GERALD C. STERNBERG, et al,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (App., *infra*, 1a) is reported at 1 F.3d 468. The Opinion of the District Court dated November 15, 1991 (App., *infra*, 32a), is unreported. The Opinion of the District Court dated April 9, 1991 (App., *infra*, 73a), is also unreported.

JURISDICTION

The jurisdiction of the District Court below in this case was based on 15 *U.S.C.*, Sections 1, 2, 15 and 26, and on 28 *U.S.C.*, Sections 1331, 1337 and 1343.

The Judgment of the Court of Appeals was entered on July 9, 1993. Rehearing was denied on August 12, 1993. App. 104a. The gist of the decision by the Court of Appeals in this case was that the Court of Appeals lacked

jurisdiction by reason of employment of a notice of appeal procedure by petitioners deemed defective by the Court of Appeals. Petitioners contend herein that the Court of Appeals in fact had jurisdiction, and the case was properly "in" the Court of Appeals, for purposes of 28 *U.S.C.*, Section 1254 (1). Hence, this Court has jurisdiction under 28 *U.S.C.*, Section 1254(1). In any event, this Court also has jurisdiction under 28 *U.S.C.*, Section 1651.

RULE INVOLVED

Rule 4(a) of the Federal Rules of Appellate Procedure provides as follows:

"(a) Appeals in Civil Cases.

(1) In a civil case in which an appeal is permitted by law as of

right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to

amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motions as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure."

STATEMENT OF THE CASE

Petitioners, John W. Strasburg and ElderCare Asset Protection Plans, Inc. (hereinafter, "Strasburg" and "ElderCare", respectively, or "petitioners", collectively) filed suit against the State Bar of Wisconsin, thirteen members of the Board of Attorneys Professional Responsibility (hereinafter, The "Board" or "BAPR"), and the Board's Administrator, Gerald C. Sternberg (hereinafter, "Sternberg"). Of

all these, however, service of the Summons and Complaint herein was effected only on Sternberg. As stated above, the jurisdiction of the District Court below in this case was based on 15 *U.S.C.*, Sections 1, 2, 15 and 26, and on 28 *U.S.C.*, Sections 1331, 1337 and 1343.

Before the case now at bar, plaintiffs had attempted to conduct a business centering on Medicaid eligibility administrative representation, advising, and related financial planning activities. The basic gravamen of this action concerned allegations of conduct of the defendants, especially Sternberg, which, although cloaked as official actions in pursuit of the lawyer discipline process, in reality amounted to an attempt to harass and intimidate plaintiffs out of conducting

their business, thereby violating plaintiffs' free speech rights, and also violating antitrust statutes and the supremacy of federal regulations concerning Medicaid representation and ancillary activities.

On November 15, 1991, the district court herein granted a motion for summary judgment to Sternberg on the ground that his actions as alleged in the Complaint were shrouded in "absolute quasi-judicial immunity" because of his position as Administrator for BAPR (App., *infra*, 32a). The same Order granting that summary judgment also dismissed without prejudice all claims against the remaining defendants due to lack of service of process within 120 days of the filing of the Complaint. (See November 15, 1991 Opinion and Order, slip op. page

19). It should be noted with painstaking clarity that the grant of summary judgment in favor of defendant Sternberg clearly meant that the action could not be refiled as to him.

Petitioners filed motions on December 16, 1991 for reconsideration, for leave to conduct discovery, and for leave to refile their Complaint as to the remaining defendants, meanwhile also filing a Notice of Appeal as to the portion of the Order of November 15, 1991, which had granted Sternberg's summary judgment motion. On December 27, 1991, the District Court denied those motions, and it dismissed the Complaint with prejudice as to the remaining defendants (App., *infra*, *107*a). On December 30, 1991, judgment was entered (App., *infra*, 120a).

The ultimate decision of the Court of Appeals as to a lack of appellate jurisdiction (App., *infra*, 1a) completely surprised petitioners even though it had been discussed at argument. The reason for the surprise was the amount of time between argument and decision. Petitioners immediately moved for rehearing. However, the Court of Appeals denied that motion (App., *infra*, 104a). This Petition For Writ Of Certiorari then was filed, challenging the Court of Appeals interpretation and application of the provisions of Rule 4(a) of the Federal Rules of Appellate Procedure.

REASONS FOR GRANTING THE WRIT

I.

IN THIS CASE THE SEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED A QUESTION OF FEDERAL APPELLATE JURISDICTION IN IMPLICIT CONFLICT WITH PRINCIPLES ENUNCIATED IN APPLICABLE DECISIONS OF THIS COURT.

Under *Supreme Court Rule* 10.1(c), it constitutes a special and important reason arguing for grant of a petition for writ of certiorari that the court of appeal below has decided a federal question in a way which conflicts with applicable decisions of this Court. Such is the case herein.

Both the Court of Appeals' underlying Opinion and its denial of rehearing overlook and misconstrue the controlling precedent in the recent decision of this Court in *FirsTier Mortgage Co. v. Investors Mortgage Ins.*

Co., 498 U.S. 269, 111 S.Ct. 648, 1122 L.Ed.2d 743 (1991) (about which more *infra*, this Section of Reasons For The Writ).

Before we can address the thrust of the *FirsTier* decision, however, we must begin with the observation that Rule 4(a)(1) of the *Federal Rules of Appellate Procedure* itself allows appeals from orders, as well as from judgments. In this case, the gist of appellees' jurisdictional contention in the Court of Appeals below was that the Notice of Appeal allegedly did not invoke the jurisdiction of that court, on the observation that the Notice came before the judgment and referenced the November 15, 1991 Order instead. The implication of this argument is that a notice of appeal can only be from a judgment

itself. This is simply not so under Rule 4(a)(1), supra.

It is universally accepted that if orders are final, they are appealable. *Knibb, Federal Court of Appeals Manual* (West, 2d ed. 1990), Section 7.3, p. 48. The necessary implication from the Court of Appeals Opinion is that an appeal can only be taken from a judgment itself. This is simply not so under Rule 4(a)(1), *supra*, and under *FirsTier, supra*.

Indeed, even the Seventh Circuit itself, in *Smith-Bey v. Hospital Administrator*, 841 F.2d 751, at 756 (7th Cir. 1988), cited by the court of Appeal's opinion below, specifically held that, where finality is presented, "the absence of a Rule 58 judgment will not defeat appellate jurisdiction. See *Bankers' Trust v. Malis*, 435 U.S. 381,

385-88, 98 S.Ct. 1117, 1120-1, 55 L.Ed.2d 357 (1978)..." In this case, however, the Seventh Circuit has disregarded its own acknowledgment in *Smith-Bey of Bankers' Trust* to that effect, and has also shrugged off the impact of *FirsTier, supra.* In this respect, the Seventh Circuit has flagrantly ignored controlling authority of this Court through a sheer exercise of will in disposing of petitioners' appeal below.

By ordering entry of judgment with prejudice as to the served defendant, the Opinion and Order dated November 15, 1991, effectively did dispose of the case in the district court. The fact that the order was contained in a document does not prevent the order portion from having the requisite finality it possesses. The fact that "legal reasoning" appeared in

the Opinion portion of that document does not change the decisional character of the Order portion. The Order portion did not contain any legal reasoning. Without any doubt, however, that order did deny all relief as to the sole served defendant.

Therefore, it was perfectly clear that nothing more which petitioners might then have done could in any way have prevented the inexorable entry of judgment against them as to the served defendant. Even if petitioners had served the remaining defendants and attempted to carry the case on against them, eventually and inevitably, judgment in favor of the served defendant would have been entered.

Under such circumstances of clear intent to follow through with entry of

judgment, the decision is already deemed final for appeal purposes. *Catlin v. United States*, 324 U.S. 229, 65 S.Ct. 631, 633 (1945). As in *Catlin*, all that remained was the execution of the inevitable judgment by the district court. This has specifically been applied in the instance of dismissal of a complaint as to all served defendants, notwithstanding the existence of unserved defendants. *FSLIC v. Tullos-Pierremont, supra*.

Rule 4(a)(2) of the *Federal Rules of Appellate Procedure* codifies this latter precept by validating an appeal taken from an order for judgment, once the judgment is entered, essentially in a *nunc pro tunc* approach, termed "relating forward". Accordingly, the notice of appeal filed below should have been

deemed to relate forward to the date of the entry of judgment.

Rule 4(a)(4) of the same Rule, after the amendment thereto in 1979, bars the application of the relating forward under Rule 4(a)(2) where certain post-trial motions are pending at the time of, or follow the notice of appeal. However, as the Court of Appeals itself pointed out, since any such motions made to the District Court below were untimely and therefore of no effect, the notice of appeal below could still relate forward under Rule 4(a)(2). (App. 10a, n. 2).

However, ruled the Court of Appeals below, the fact that unserved defendants remained after summary judgment was granted to Sternberg both prevented finality and barred the relating forward, on the contention that further

proceedings were then contemplated by the District Court as to such other defendants (App. 17a).

The 1979 amendment to Rule 4(a)(4) has been criticized as "creat(ing) a trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion or while a posttrial motion is pending." Advisory Committee Notes to Rule 4, *Fed. R. of App. Proc.*, at *U.S.C.A.*, p. 942. A proposed amendment to Rule 4 may soon remove that pitfall, and thereby allow such notices of appeal to survive. *ibid.* However, as noted, *supra*, Rule 4(a)(4) does not apply herein, and hence, that amendment will not address the unserved defendants situation faced squarely herein.

Having laid this background, we turn now to *FirsTier Mortgage Co. v. Investors*

Mortgage Ins. Co., 498 U.S. 269, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991). The decision below as to which review is sought does indeed ignore the impact of that case. *FirsTier* concerned an appeal from an order declaring that summary judgment would be entered, as did this case. In fact, in *FirsTier* the "announcement" of that order was merely a bench decision, and did not consist of any document at all. *A fortiori*, the *FirsTier* precept applies even more strongly herein, where the grant of summary judgment in the Order of November 15, 1991, was a judgment in substance as to the served defendant's disposition, and lacked only the formal denomination as a judgment document.

Notwithstanding that the District Court in *FirsTier* had stated that both

findings of fact/conclusions of law and a memorandum opinion would intervene before issuance of the judgment document, this Court held that an appeal from the order was validated pursuant to Rule 4(a)(2).

Indeed, in the case at bar, no such further opinion or other judicial act remained as to the served defendant. Accordingly, as was the case in *Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1222 (7th Cir. 1991), "as soon as the proper judgment was entered....(plaintiffs') notice of appeal (citing the prior order) accordingly sprang into force...."

Nothing more remained to be done in the case at bar with regard to summary judgment as to the served defendant, Sternberg, after the Order of November 15, 1991. Hence, it is as if the

judgment immediately followed that Order. In this light, the Notice of Appeal from that Order is immediately recognizable as validated under Rule 4(a)(2). See *Metropolitan Life, supra*.

The November 15, 1991 Order completely disposed of all claims against the served defendant. Given this, contrary to the Opinion of the Seventh Circuit below, it was indeed entirely reasonable, therefore, for petitioners to view that Order as functionally dispositive and final as to the served defendant.

The Opinion of the Seventh Circuit below attempts to skirt *FirsTier* by reasoning that it was unreasonable for petitioners to conclude from the November 15th Order that the litigation was at an end, due to the presence of unserved

defendants, as to whom petitioners might choose to proceed, thereby carrying on the case.

It should carefully be observed that no prior Seventh Circuit case had ever so held, either as to matters generally within the option of the appellant, or as to unserved defendants specifically. In what manner of reasoning petitioners' conclusion as to finality could then have been said to be 'unreasonable' is entirely unclear from the Court of Appeals' Opinion. The most that it says regarding prior Seventh Circuit authority is that the decision in this case can "peacefully coexist" with the closest prior decision, *Harris v. Milwaukee County Circuit Court*, 886 F.2d 982 (7th Cir. 1989), which the Court of Appeals found necessary to distinguish to arrive

at the adverse result herein. On such a lay of the law within the Seventh Circuit, petitioners' view of finality of the November 15th Order was thoroughly reasonable.

Moreover, as will appear more fully in the third Reason For The Writ, *infra*, decisions elsewhere seem universal in holding that unserved defendants do not interfere with finality at all, and that matters within an appellant's option are not bars to finality where they are not exercised by the prospective appellant. See, e.g. *Tullos-Pierremont, supra; Tiernan v. Devoe*, 923 F.2d 1024 (3rd Cir. 1991). Hence, considering such authority elsewhere, petitioners' conclusion as to finality was more reasonable still.

It would be both ironic and unjust if "reasonability", as used by this Court

in *FirsTier*, would be forced to depend on what circuit an appeal was within. The irony is only heightened further where, as herein, the particular circuit has no authority contrary to the conclusion reached by the appellant when filing the notice of appeal.

Therefore, in sum, the Court of Appeals' position below is not within the contemplation of, and in fact runs contrary to this Court's intent in *FirsTier*.

It should also be noted that the 120 day period for service was long expired below by time the District Court granted summary judgment. Hence, the order allowing service within 30 days was quite a surprise to petitioners, who had long since opted to pursue only defendant Sternberg.

FirsTier contrastingly illustrates an "unreasonable" view of finality with instantly recognizable examples of interlocutory orders, such as discovery rulings (111 S.Ct. at 563). Such mere acknowledgment that some extreme case of unreasonability exists to bar application of Rule 4(a)(2)'s saving provision cannot itself be taken to authorize the speculative and almost partisan critique by the Court of Appeals herein of a *prima facie* reasonable view by a litigant of finality. Reasonable is reasonable. Hence, petitioners assert that review is appropriate, in light of the transgression of the *FirsTier* standard presented by the decision below.

From the logic employed by the Seventh Circuit in holding jurisdiction to be lacking in this case, *a fortiori*,

it would also have held the appellant's view of finality to have been unreasonable in *FirsTier* as well in light of the more extreme facts of that case. Hence, the Seventh Circuit would have ruled contrary to the holding of this Court in *FirsTier*. This Court should act to square up this discrepancy and its indicated lack of comprehension of the significance of *FirsTier*.

Were the Seventh Circuit's standard of reasonability, as applied in this case, the prevailing one, then indeed, as *Smith-Bey*, *supra*, observed in rejecting such an austere approach, at 841 F.2d 755, every "litigant [would be] forced to guess or to do legal research as to whether a final decision has been rendered".

Whether the case might go forward in the District Court against other, unserved defendants was a question entirely divorced from the disposition as to the served defendant Sternberg. Nothing which might have been done, either by petitioners or the District Court, as to the unserved defendants could have resurrected petitioners' claims against the served defendant after the November 15, 1991 Order had granted summary judgment.

From that disposition, the District Court could just as appropriately immediately have entered a judgment effecting the summary judgment grant. See generally, Rule 54(b), *Federal Rules of Civil Procedure*, as to authorization for judgment as to some, but not all litigants. (Note that the finality

certification procedure of Rule 54(b) is not required as a precondition to finality in the case of unserved defendants. *Gomez v. Government of Virgin Islands, Dept. of Public Safety*, 882 F.2d 733 (3rd Cir. 1989); *Loman Development Co. v. Daytona Hotel & Motel Suppliers*, 817 F.2d 1533, 1536 (11th Cir. 1987).

Loman, ibid, notes that "all of Loman's claims against [served defendants]" were adjudicated. Likewise herein, all claims against the served defendant were addressed and disposed of by the November 15, 1991 Order of the District Court below. That Order called for judgment for the served defendant, Sternberg, dismissing all claims against him "with prejudice".

The proper view of the existence of appellate jurisdiction herein is shown by the mere substitution, with only immaterial differences, of the identities and dates in this case, for those in the *FirsTier* opinion itself, thus:

> "Had the judge set forth the judgment immediately following the [Order of November 15th], and had the clerk entered the judgment,... there is no question that the [Order of November 15th] would have been "final" under Section 1291. Under such circumstances, (petitioners') belief in the finality of the (November 15th) ruling was reasonable, and its premature (December 16th) notice therefore should be treated as an effective

notice of appeal from the judgment entered on (December 30, 1991)."

FirsTier, at 111 S.Ct. 653

It is clarified by *FirsTier* that such a ruling is to be deemed a "decision" under Rule 4(a)(2), and that a notice of appeal referring to such a ruling is subsequently validated, *nunc pro tunc*, upon entry of a subsequent judgment, as herein. Nothing could have been more simple or more controlling over the appeal below.

Nevertheless, the Court of Appeals below overlooked the sweeping, theoretical nature of the approach taken by this Court in *FirsTier*. Instead, the decision below appears to attempt to relegate *FirsTier* to a splitting of minutiae of the facts of a specific case. That decision also seems to view *FirsTier*

as allowing a singular attempt by the Court of Appeals, as a means of setting the limits of appellate jurisdiction in this case, to speculate at the state of mind of petitioners, both at the time they launched their notice of appeal, and at later times below.

That reading of *FirsTier* would be profound error. *FirsTier* clearly enunciates a philosophical view of the bounds of appellate jurisdiction under 28 *U.S.C.*, Section 1291 and Rule 4(a)(2) that quite dramatically represents a 'sea change', when contrasted to prior quarrels in the various circuits about the precise facts once thought critical to invocation of the savings provision of Rule 4(a)(2).

Illustratively, this Court's broad view is exemplified *by FirsTiers*

reference (at 111 S.Ct. 652) to cases such as *Ruby v. Secretary of Navy*, 365 F.2d 385 (9th Cir. 1966), which allowed a notice of appeal from a dismissal of a complaint (even though not foreclosing amendment of the complaint) to stand as an effective appeal from the subsequent dismissal of the action itself (when the complaint was not amended). This Court clearly declared in *FirsTier* that such cases more accurately show the original intent behind Rule 4(a)(2). Hence, the ruling in *FirsTier* stands as a clear determination that the hyper-technical approach used by some courts in intervening years had been out of keeping with that intent. Under *FirsTier*, there simply is no longer any room to so closely augur the entrails of the specific chronology of pre-judgment

events or to engage in fine distinctions about that chronology.

In closing, as the Court of Appeals itself pointed out in its Opinion herein, because petitioners' subsequent motions to the district court were untimely, there is no basis for the application of Rule 4(a)(4). Rather, as already shown, the general savings provision of Rule 4(a)(2) applies instead herein. As to the served defendant's liability, the Order of November 15, 1991, certainly was final, and an immediate judgment therefore would certainly have been appealable. Under *FirsTier* and the other authorities discussed, *supra*, *the* "relation forward" allowed by Rule 4(a)(2) clearly applied to the Notice of Appeal herein, validating it as soon as judgment was entered on December 30, 1991.

II.

IN THIS CASE, THE SEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL APPELLATE JURISDICTION WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT.

Alternatively to the foregoing Reason, also under *Supreme Court Rule* 10.1(c), it is a distinct, special and important reason to grant of a petition for writ of certiorari that the court of appeals below has decided an important federal question which has not been, but which should be settled by this Court.

Here, we assume, strictly *arguendo*, that no conflict with *FirsTier*, *supra*, or with any other Supreme Court precedent is presented by the Court of Appeals decision below herein. However, it then becomes apparent in any case that the important question of the correct and reasonable construction of appellate

jurisdiction is one that should be settled by this Court, in light of the seeming clash between *FirsTier* and the ruling below.

Contrasting sharply with this Court's approach in *FirsTier*, the decision of the Court of Appeals below in this case is a novel, overly-aggressive application of denial of appellate jurisdiction. In fact, the decision below rests on the subjective basis of that court's attempt to read the plaintiffs' state of mind, as a purported reflection of "unreasonability". This attempt to find 'hidden unreasonability' behind an objective appearance of reasonability presents an important question, worthy of close evaluation by this Court.

Not only does the Court of Appeals decision herein seem to conflict with both *FirsTier* and the plain terms of Rule 4(a) itself, but it also is irreconcilable with prior decisions of the Seventh Circuit itself, without recognizing any intervening change in approach. *Smith-Bey v. Hospital Administrator*, 841 F.2d 751, at 756 (7th Cir. 1988), cited by the court of Appeal's opinion below, specifically held, in favor of appellants, that an order dismissing claims with prejudice is final for appealability purposes. The functionally identical dismissal with prejudice here of all claims against the sole served defendant should have yielded a result identical to that in *Smith-Bey*.

As was the case in *Smith-Bey*, *supra*, in this case as well, with regard to the

served defendant, Sternberg, once the order dismissing with prejudice was issued, there was nothing more that petitioners could do with regard to claims against Sternberg except appeal. Even more explicitly yet, *Smith-Bey* went on to specifically hold that, where finality is thus presented, "the absence of a Rule 58 judgment will not defeat appellate jurisdiction. See *Bankers' Trust v. Malis, 435* U.S. 381, 385-88, 98 S.Ct. 1117, 1120-1, 55 L.Ed.2d 357 (1978)..." Neither should its absence have defeated appellate jurisdiction herein.

Similarly, as was the case in *Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1222 (7th Cir. 1991), "as soon as the proper judgment was entered .... [plaintiffs'] notice of

appeal [citing the prior order] accordingly sprang into force...."

Because nothing more remained to be done in the case at bar with regard to summary judgment as to the served defendant, Sternberg, it is as if the judgment immediately followed that Order. In this light, the Notice of Appeal from that Order is immediately recognizable as validated under Rule 4(a)(2). See *Metropolitan Life, supra.*

If *FirsTier* is not in fact controlling herein, then the inconsistency between *Smith-Bey and Cammon*, on one hand, and the decision below in this case, on the other hand, demonstrates a profound confusion even within a given court of appeals about appellate jurisdiction under *FirsTier*. This state of confusion strongly suggests

the urgent importance of a clarifying ruling by means of review in this case.

III.

IN THIS CASE THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS AS TO FEDERAL APPELLATE JURISDICTION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS ON THE SAME MATTER.

Quite separately from the status of the Court of Appeals decision in this case *vis-a-vis* decisions of this Court, under *Supreme Court Rule* 10.1(a), it constitutes a distinct, important reason to grant certiorari that the decision of the court of appeals conflicts with a decision of another court of appeals on the same matter. Such conflict is unquestionably presented by the decision below.

The Order of November 15, 1991, in addition to granting summary judgment to the served defendant, Sternberg, also did

leave open for an additional period the possibility of serving previously unserved defendants. Yet this is no legal index of any lack of finality as to the final decision reached as to the served defendant, Sternberg.

Unserved parties are simply not parties at all, for purposes of a finality analysis, and hence, the potential for subsequent service upon them is routinely held in other circuits not to interfere with finality of either a judgment or an order. *Federal Savings and Loan Ins. Corp. v. Tullos-Pierremont*, 894 F.2d 1469, 1472-3 (5th Cir. 1990); *Insurance Co. of North America v. Dealy*, 911 F.2d 1096, 1099 (5th Cir. 1989); *Young v. Mt. Hawley Ins. Co.*, 864 F.2d 81, 83 (8th Cir. 1989); *Insinga v. LaBella*, 817 F.2d 1469 1470 (11th Cir.

1987); *Bristol v. Fibreboard Corp.*, 789 F.2d 846, 847 (10th Cir. 1986); *Leonhard v. United States*, 633 F.2d 599, 608-9 (2d Cir. 1980); *DeTore v. Jersey City Police Employees Union*, 615 F.2d 980, 982 at n.2 (3d Cir. 1980). Ironically, the Seventh Circuit itself was one of the first to enunciate this very principle. *Bradshaw v. Miners' Bank of Joplin*, 81 F. 902, 904 (7th Cir. 1897). Yet in the case at bar, it has forsaken it.

Where a judgment of dismissal is rendered as to all served defendants, and only unserved, nonappearing defendants remain, judgment is final and appealable. *Tullos-Pierremont, supra.* Likewise herein, all claims against the served party were addressed by the Opinion and Order appealed from. That order called

for the entry of judgment against plaintiffs on all those claims, dismissing them all "with prejudice". Therefore, notwithstanding that unserved defendants nominally remained in the action, the disposition should have been deemed final and appealable below.

Nevertheless, the Court of Appeals took the position that the unserved parties could be served, and that this fact purportedly deprived the summary judgment grant to Sternberg of finality. Yet ultimately, because the remaining defendants were not served, their dismissal was converted to dismissal with prejudice. It is obvious that this conversion retroactively rendered the prior disposition complete.

In contrast to the holding below, the Third Circuit has taken a position to

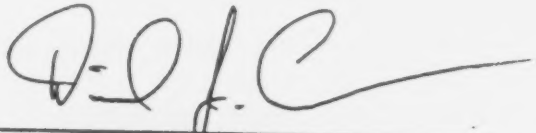
the contrary in analogous circumstances. *In Tiernan v. Devoe*, 923 F.2d 1024 (3rd Cir. 1991), that court observed that jurisdiction could be deemed lacking at the time of a similar summary judgment as to one group of parties, since a contemporaneous dismissal as to another group was then without prejudice. However, ruled the court, when the plaintiffs later renounced any intention to take any further action against that group of defendants, the jurisdictional problem was retroactively cured. *Tiernan* again points up the conflict between this case in the Seventh Circuit and the approach taken in similar cases in other circuits. See also *Gomez v. Government of Virgin Islands, Dept. of Public Safety*, 882 F.2d 733 (3rd Cir. 1989) in which the same court held that in the

context of a summary judgment as to one defendant, the presence of remaining, unserved defendants does not interfere with finality for purposes of appeal.

Because the foregoing authority cited in this Section of the Reasons for issuance of the writ clearly shows a distinct rift between decisions in other circuits on one hand, and the decision of the Seventh Circuit below herein on the other, the writ sought should issue for this distinct reason as well.

CONCLUSION

Wherefore, based on each and all of the foregoing Reasons, petitioners respectfully pray that their Petition for Writ of Certiorari be granted.



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(2)

93-905

Supreme Court, U.S.
FILED
NOV 10 1993
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

JOHN W. STRASBURG and
ELDERCARE ASSET PROTECTION PLANS, INC.,

Petitioners,

v.

STATE BAR OF WISCONSIN,
GERALD C. STERNBERG, et al,

Respondents.

**PETITIONERS' APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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In the
United States Court of Appeals
For the Seventh Circuit

No. 91-3860

JOHN W. STRASBURG, and ELDERCARE ASSET PROTECTION PLANS, INC.,
Plaintiffs-Appellants,

v.

STATE BAR OF WISCONSIN, GERALD C. STERNBERG, JOHN A. BOLZ, JOHN E. SHANNON, EDMUND MANYDEEDS, III, JACQUELINE BOHMAN, WILBUR W. WARREN III, MICHAEL WHERRY, MICHAEL FAUERBACH, LISA LOTTE GAMELTOFT, PATRICIA GROVE, ROBERT J. KAY, CELIA SERAPHIM, and DIANE ZORE,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Wisconsin

No. 91 C 018-Barbara B. Crabb,
Chief Judge.

ARGUED JANUARY 25, 1993
- DECIDED JULY 9, 1993

Before CUDAHY and FLAUM, Circuit Judges, and MIHM, Chief District Judge.*

FLAUM, Circuit Judge. The plaintiffs, John W. Strasburg and ElderCare Asset Protection Plans, Inc. filed suit against the State Bar of Wisconsin and thirteen members of the Board of Attorneys Professional Responsibility, alleging that the defendants attempted to prevent them from engaging in activities that non-lawyers could perform, contrary to the terms of Strasburg's two-year suspension from the practice of law. By filing an untimely notice of appeal from an adverse decision in district court, and by refusing to refile once notified of their mistake, the plaintiffs

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* The Honorable Michael M. Mihm, Chief Judge of the Central District of Illinois, sitting by designation.

entangled their appeal in a welter of jurisdictional problems. We now dismiss their appeal for want of jurisdiction.

On November 15, 1991, the district court granted summary judgment in favor of the defendants. The court determined that one of the defendants, Gerald C. Sternberg, was entitled to summary judgment because his actions were shrouded in "absolute quasi-judicial immunity", while the remaining defendants were entitled to the same result because they were not served with process within 120 days of the filing of the complaint. The district court issued an opinion and order, the latter providing as follows:

> "IT IS ORDERED that defendants' motion for summary judgment is GRANTED and this case is DISMISSED with prejudice with respect to defendant Gerald C. Sternberg, in

> his individual capacity, and without prejudice with respect to the remaining defendants. If plaintiffs believe they have viable claims against these defendants, they may have until December 15, 1991, in which to refile the action and accomplish service. If plaintiffs do not do so, the dismissal of the complaint against remaining defendants will be amended to be with prejudice, and final judgment will be entered in favor of all defendants."

Strasburg v. State Bar of Wisconsin, No 91-C-018-C, slip op. at 18-19 (N.D.Ill. Nov. 15, 1991). The plaintiffs failed to refile and reserve the remaining defendants by December 15. Instead, on December 16, they filed a flurry of motions in the district court: (1) they

moved for rehearing and reconsideration of the November 15 decision, and for leave to conduct additional discovery; (2) they moved to refile their complaint and asked the court to permit service on the remaining defendants; (3) they filed a notice of appeal from the November 15 decision.[1]

The district court responded on December 27, 1991, with an order denying all of the plaintiffs' motions. The court rejected the plaintiffs' arguments

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[1] Both parties are under the misconception that the notice of appeal was filed on December 15, 1991. They were probably misled by the date typed onto the notice itself by the plaintiffs, which reads "December 15". The pertinent date of filing, however, is not the date the litigant prepares the document, but the date it is filed in court. The clerk of the court stamped "4:15 p.m., December 16, 1991," on their notice, and we measure time from that day.

for vacating its earlier decision. It also commented that the motion to refile the complaint against the remaining defendants was too late; the plaintiffs had missed the December 15 deadline and, in any event, still had not accomplished service on the remaining defendants. The court therefore made good on its earlier threat, dismissing the complaint with respect to the other defendants with prejudice, and directing the clerk of court to enter final judgment accordingly. On December 30, final judgment was entered pursuant to Federal Rule of Civil Procedure 58.

Because the plaintiffs appealed only from the November 15 order, both the district court and this court of appeals have repeatedly questioned the validity of their notice of appeal. In its December 27 decision, the district court

stated that the notice of appeal from the November 15 order was a "nullity". The district court explained: "First, there is no final judgment (or its equivalent) from which to take an appeal. Second, even if there were such a judgment, a notice of appeal has no effect if it is filed before the disposition of substantive post judgment motions." Strasburg v. State Bar of Wisconsin, No. 91-C-018-C, slip op. at 2 (N.D. Ill.[sic] Dec. 27, 1991). Despite this warning, the plaintiffs never filed a notice of appeal from the December 30 final judgment. On January 2, 1992, we indicated to the parties that "[a] preliminary review of the short record indicates that the order appealed from may not be a final judgment within the meaning of 28 *U.S.C.* Sec. 1291." *Strasburg v. State Bar of Wisconsin*, No.

91-3860 (7th Cir. Jan. 2, 1992). We directed the plaintiffs to file a brief memorandum by January 17, 1992 explaining why we should not discuss the case for lack of jurisdiction. The plaintiffs never responded to our order. Indeed, their opening brief contains not a whit of argument on the question of jurisdiction, and their cursory jurisdictional statement does not even hint that beneath the surface of their appeal a serious problem lurks.

A notice of appeal must be filed within thirty days after the entry of judgment. See *Fed. R. App. P.* 4(a)(1). The purpose of this requirement is to provide certainty to litigants about when filing requirements for postjudgment motions and appeals begin to run. "Otherwise a litigant is forced to guess or to do legal research as to whether a

final decision has been rendered." *Smith-Bey v. Hospital Administrator*, 841 F.2d 751, 755 (7th Cir. 1988). In this case, the entry of judgment did not occur until December 30, 1991, and the plaintiffs did not file a new notice of appeal thereafter. Ordinarily, the consequence of filing a premature notice of appeal is appellate dismissal. The *Federal Rules of Appellate Procedure* do, however, offer relief in limited instances from this harsh result. Rule 4(a)(2) provides:

> "Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the date thereof."

Fed. R. App. P. 4(a)(2).[2] The rule allows certain premature appeals to "relate forward" to the date of the entry of judgment, thus providing an exception to the strict requirements of Rule 4(a)(1).

The trouble with Rule 4(a)(2) is that it is imprecise--it does not tell us

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[2] The exception set out in Rule 4(a)(4) provides that certain post-judgment motions (namely, those filed under Rule 50(b), 52(b) or 59 toll the time for appeal and nullify any notice of appeal filed before their disposition. The district court believed that the plaintiffs' December 16 motions canceled their earlier notice of appeal, but all of those motions were filed more than ten days after the November 15 decision. They could not, therefore have been filed under Rule 50(b), 52(b) or 59. Although it is often difficult to determine whether an unlabeled, postjudgment motion falls into one of the Rule 4(a)(4) categories, see generally *Charles W. Adams, The Timing of Appeals Under Rule 4(a)(4) of the Federal Rules of Appellate Procedure*, 123 F.R.D. 371 (1988), here it is clear that these motions had no effect on the validity of the notice of appeal from the November 15 order.

which announced decisions permit relation forward. The announced decision must bear some close relation to the final judgment, or else litigants would save themselves the trouble of determining which document is the final judgment, and simply appeal the first decision on any matter handed down by the district court. In the past, several circuits, including our own, ruled that only announcements of final decisions (defined as those decisions that "end [ ] the litigation on the merits and leave [ ] nothing for the court to do but execute the judgment," *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed.2d 911 (1945) (citation omitted) trigger Rule 4(a)(2). See *United States v. Ettrick Wood Prods., Inc.*, 916 F.2d 1211, 1217 (7th Cir.1990); *United States v. Hansen*,

795 F.2d 35, 37-38 (7th Cir. 1986); see also *9 James Wm. Moore et al., Moore's Federal Practice*, Paragr. 204.14, at 4-129 & n.24 (2d ed. 1993) (stating that Rule 4(a)(2) is clearly inapplicable" when "the appeal is not taken after the announcement of any final decision.") But cf. *Harris v. Milwaukee County Circuit Court*, 886 F.2d 982 (7th Cir. 1989) (allowing relation forward from a post-dated judgment, despite the fact that it was not a final decision). In effect, these courts ruled that for a premature notice of appeal to relate forward, the decision it appeals must conclude the litigation completely, except for the essentially clerical step of entering judgment.

The leading case interpreting the rule is now *FirsTier Mortgage Company v.*

Investors Mortgage Insurance Company, 498 U.S. 269, 111 S.Ct. 648, 112 L.Ed.2d 743 (1991). According to the Supreme Court, the purpose of Rule 4(a)(2) is to protect from dismissal the unskilled litigant who files a notice of appeal from a decision that he "reasonably but mistakenly believes to be a final judgment, while failing to file a notice of appeal from the actual final judgment." *Id.* at 276, 111 S.Ct. at 652-53. In *FirsTier*, the district court announced from the bench that it was granting the defendant's motion for summary judgment. The court then requested the defendant to submit proposed findings of fact and conclusions of law to support the decision, and stated that it would allow the plaintiff the opportunity to respond to these proposals. The plaintiff, however, filed a notice of appeal without waiting for

the district court to enter final judgment. The Supreme Court held that this notice of appeal could relate forward to the eventual entry of final judgment, thereby preserving the appeal.

The Supreme Court decided in *FirsTier* that the announced decision under Rule 4(a)(2) need not actually be a final decision, so long as it was reasonable for the would be appellant to think that the case had ended. Presumably, the Supreme Court did not literally mean that the litigant must "reasonably but mistakenly believe [ ]" that the announced decision was a final judgment, because judgments have certain attributes, (for example, "(e)very judgment must be set forth on a separate document," *Fed. R. Civ. P. 58;* see also *Reyblatt v. Denton*, 812 F.2d 1042, 1043-44 (7th Cir. 1987) (other

requirements) that are not easily mistaken. Nor did the Court likely mean that the litigant must reasonably think that he is appealing a final decision, since surely it is not reasonable for the appellant in *FirsTier* to think that the litigation was over, when the district court's order expressly stated that the court would entertain further motions by the parties. Both "final judgment" and "final decision" are specialized terms probably unfamiliar to the unskilled litigant's ears.

Instead, *FirsTier* appears to save a notice of appeal filed after a decision when the litigant could reasonably believe that the outcome of the case is settled, even if the district court has ministerial duties left to complete. Other passages in the Supreme Court's opinion seemingly indicate as much:

> "In our view, Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that *would* be appealable if immediately followed by the entry of judgment. In these instances, a litigant's confusion is understandable, and permitting the notice of appeal to become effective when judgment is entered does not catch the appellee by surprise."

FirsTier, 498 U.S. at 276, 111 S.Ct. at 653 (emphasis in original). A decision that would be appealable if immediately followed by the entry of judgment is one that effectively resolves all the claims, even if the litigation is not technically at an end. In certain situations, it may be debatable whether a ruling settles the

outcome of the case. See *Allan Ides, The Authority of a Federal District Court to Proceed After a Notice of Appeal Has Been Filed*, 143 F.R.D. 307, 313-16 (1993). But patently interlocutory decisions, such as discovery rulings or sanction orders, do not merit the saving provision of Rule 4(a)(2), see *FirsTier*, 498 U.S. at 276, 111 S.Ct. at 653, while dispositive rulings such as orders granting default judgments do, see *Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1222 (7th Cir. 1991). The central question is whether the district court has "announce[d] a decision purporting to dispose of all of the litigant's claims." *FirsTier*, 498 U.S. at 277, 111 S.Ct. at 653.[3]

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[3] This construction suggests an alternate reading of Rule 4(a)(2) that may better fit the Supreme Court's

In this case, the district court's November 15 order made clear that the outcome of the case was still open. The plaintiffs could not reasonably have thought that the result was settled; the order expressly conditioned the final disposition of the suit. In *FirsTier*, by contrast, "the fact remains that the bench ruling did announce a decision purporting to dispose of all of *FirsTier's* claims." *Id.* Whereas the district court in *FirsTier* had only ministerial functions left to complete after announcing summary judgment, the

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approach. On the alternate reading, the key terms to be contrasted in the rule are not *decision* and *judgment*, but *announcement* and *entry*. A decision permits relation forward if it *announces a* final judgment, i.e., forecasts the final outcome, even if that judgment has not yet been formally *entered*. On this reading, the decision and the judgment are assumed to be substantively similar.

district court's order here notified the parties that they should expect further dispositive rulings by the court. The district court here could not have "set forth the judgment immediately following the bench ruling," *Id.* because it had already provided thirty days for the plaintiffs to refile their complaint.

More importantly, *FirsTier* indicates that Rule 4(a)(2), at bottom, is concerned with saving litigants who make a good-faith effort to comply with the procedural rules for filing an appeal, but through inadvertence or ignorance run afoul of them. Even if the plaintiffs' initial belief as to the appealability of the November 15 order was reasonable when they filed their notice of appeal, their refusal to refile became unreasonable when they were expressly informed by the district court on December 27 that the

November 15 order was not a final judgment and that their notice of appeal was a "nullity". We believe that a litigant seeking to take advantage of Rule 4(a)(2)'s saving provision must continue to be reasonably "confus[ed] as to the status of the litigation," *id*, until final judgment is actually entered. If the litigant becomes aware of the fact that the notice of appeal is invalid because no final judgment has yet been entered, then he or she has both the knowledge and the opportunity (for thirty more days) to correct the mistake. This rule makes sense in light of the fact that the notice of appeal does not relate forward and become effective until final judgment is entered, because up to that time there is nothing for the notice to relate forward to. In *FirsTier*, the appellants never knew that their initial

notice of appeal was untimely. Here, once the plaintiffs were informed that their notice was a nullity, they only had to wait for the real final judgment to be entered three days later, and then file a new notice of appeal.[4]

We previously held, in a case decided prior to *FirsTier*, that Rule 4(a)(2) allowed a notice of appeal to relate forward from a district court order similar to this one. In *Harris v. Milwaukee County Circuit Court*, 886 F.2d 982 (7th Cir. 1989), the district court denied a prisoner's request to proceed in forma pauperis. The district court stated: "Plaintiff shall have twenty (20) days from the receipt of this order to

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[4] If the plaintiffs did not realize even then that their notice was untimely, they still had twenty-seven days after we informed them of the same fact to file a new notice.

pay the required filing fee. If this deadline passes without the filing fee paid, this order will ripen into a final judgment of dismissal without further order." The prisoner filed a notice of appeal from the dismissal of the suit before the twenty days elapsed, and thus before the order became a final judgment. We held that under Rule 4(a)(2) the premature notice of appeal related forward to the day the order ripened into a final judgment.

We do not decide today whether *Harris* survives *FirsTier*. In any event, we believe that our decision in this case can peacefully coexist with *Harris*. There, the district court's statement that "this order will ripen into a final judgment of dismissal without further order" could easily have misled the appellant into thinking that the decision

disposed of the case without further action by the court--that the outcome was already settled. The appellant in *Harris* never knew that his notice of appeal was premature. Here, contrastingly, the district court made clear that additional action to dispose of the case was still necessary, and later told the plaintiffs that their notice of appeal was ineffective. Their behavior in pursuing this appeal was thus unreasonable.

The appeal is DISMISSED for want of jurisdiction.

A true copy;

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
May 21, 1992

By the Court:

JOHN W. STRASBURG and ELDERCARE ASSET PROTECTION PLANS, for INCORPORATED, Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Western District of Wisconsin
No. 91-3860 v.	)	No. 91 C 18, Barbara B. Crabb, Judge
STATE BAR OF WISCONSIN GERALD C. STERNBERG, JOHN A. BOLTZ, et al., Defendants-Appellees.	)	

ORDER

The court, on its own motion, orders that the briefing in this appeal shall proceed as follows:

1. The plaintiffs-appellants shall file their joint brief and required short appendix on or before June 24, 1992.

2. The defendants-appellees shall file their joint brief on or before July 24, 1992.

3. The plaintiffs-appellants shall file their joint reply brief, if any, on or before August 7, 1992.

NOTE: The parties are advised that Federal Rules of Appellate Procedure, 26(c), which allows for three additional days after service by mail, does not apply when the due dates of briefs are set forth by order of this court. All briefs are due by the dates ordered.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Dated: July 21, 1992

By the Court:

No. 91-3860

JOHN STRASBURG and ELDERCARE ASSET PROTECTION PLANS, INCORPORATED,
Plaintiffs-Appellants

v.

STATE BAR OF WISCONSIN, GERALD C. STERNBERG, JOHN A. BOLTZ, et al.,
Defendants-Appellees

Appeal from the United States District Court for the Western District of Wisconsin
No. 91 C 18, Judge Barbara B. Crabb

This matter comes before the court for its consideration of the MOTION FOR LEAVE TO FILE BRIEF INSTANTER filed herein on 7/20/92 by the appellants. On consideration thereof,

IT IS ORDERED that said motion is GRANTED and the clerk of this court is

directed to file instanter the tendered copies of the brief and the required short appendix of the appellant.

IT IS FURTHER ORDERED that the brief of the appellees will be due by 8/21/92 and the reply brief of the appellants, if any, will be due by 9/4/92.

NOTE: The parties are advised that Rule 26(c) of the Federal Rules of Appellate Procedure, which allows for three additional days after service by mail, shall not apply when the due dates of briefs are specifically set forth by order of this court. All briefs are due by the dates ordered.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
January 2, 1992

By the Court:

JOHN W. STRASBURG and ELDERCARE ASSET PROTECTION PLANS, INCORPORATED, Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Western District of Wisconsin.
No. 91-3860 v.	)	No. 91 C 18 Barbara B. Crabb, Judge
STATE BAR OF WISCONSIN GERALD C. STERNBERG, JOHN A. BOLTZ, et al., Defendants-Appellees.	)	

ORDER

A preliminary review of the short record indicates that the order appealed from may not be a final judgment within the meaning of 28 U.S.C. Sec. 1291. In the present case, the district court dismissed the case with prejudice with respect to defendant Gerald C. Sternberg, in his individual capacity, and without prejudice with respect to the

other defendants. Plaintiffs were given until December 15, 1991 to refile the action and accomplish service. The district judge did not dismiss the action, and did not state the order would become a final judgment if an amended complaint was not filed. Instead, the district judge stated that if no amended complaint is filed "the dismissal of the complaint against remaining defendants will be amended to be with prejudice and final judgment will be entered in favor of all defendants." On December 16, 1991, plaintiffs-appellants filed a notice of appeal which appears to be premature. *Brekke v. Morrow*, 840 F.2d 4 (7th Cir. 1988); cf. *Harris v. Milwaukee County Circuit Court*, 886 F.2d 892 (7th Cir. 1989) (district court's order stated its order would become a final judgment on a specified date unless a specified

contingency occurred; appealable). Accordingly,

IT IS ORDERED that plaintiffs-appellants shall file, on or before January 17, 1992, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to *Fed. R. App. P.* 42(b) will satisfy this requirement. Briefing shall be held in abeyance pending further court order.

NOTE: Caption document "JURISDICTIONAL MEMORANDUM." The filing of a Circuit Rule 3(c) Jurisdictional Statement does not satisfy your obligation under this order.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN W. STRASBURG, and
ELDERCARE ASSET PROTECTION
PLANS, INCORPORATED,

Plaintiffs,

v.

OPINION AND
ORDER
91-C-018-C

STATE BAR OF WISCONSIN,
BOARD OF ATTORNEYS PROFESSIONAL
RESPONSIBILITY, GERALD C. STERNBERG,
JOHN A. BOLZ, JOHN E. SHANNON,
EDMUND MANYDEEDS, III, JACQUELINE
BOHMAN, WILBUR W. WARREN III,
MICHAEL WHERRY, MICHAEL FAUERBACH,
LISA LOTTE GAMELTOFT, PATRICIA
GROVE, ROBERT J. KAY, CELIA SERAPHIM,
DIANE ZORE, AND THE SUPREME COURT
OF THE STATE OF WISCONSIN,

Defendants.

This is a civil suit for money damages and declaratory and injunctive relief. Jurisdiction is asserted under 15 *U.S.C.* Secs. 1, 15, 26 and 28 *U.S.C.* Secs. 1331, 1337 and 1343, and the

doctrines of pendent and supplemental jurisdiction. Plaintiffs allege that defendants have attempted to prevent them from engaging in activities that may be performed by non-lawyers and that defendants have done this on the asserted ground that such activities constitute the practice of law, in violation of the terms of plaintiff Strasburg's two-year suspension from the practice of law.

Plaintiffs set forth seven counts of wrongdoing on defendants' part. In Count I they contend that defendants' prohibition of plaintiffs' representation of Medical Assistance recipients and applicants violates 42 *U.S.C.* Sec. 19 and the *Supremacy Clause* of the United States Constitution, unlawfully preventing plaintiffs from conducting legitimate business. In Count II, they allege that defendants have restrained trade in

Milwaukee, the states of Wisconsin and Illinois and elsewhere, and that in doing so, defendants have combined to restrict trade or commerce among the states in violation of Section 1 of the Sherman Act, 15 *U.S.C.* Sec. 1. In Count III they allege that defendants have combined to restrict trade or commerce in violation of *Wis. Stat.*, Sec. 133.03(1) by preventing plaintiffs from conducting a legitimate business. In Count IV, plaintiffs allege that defendants have violated *Wis. Stat.* Sec. 134.01 by combining for the purpose of willfully or viciously injuring plaintiffs in their reputation, trade or profession. In Count V, plaintiffs allege that defendants' conduct prohibits them from communicating freely with their customers and others in violation of the *First*

Amendment to the United States Constitution.

In Count VI, plaintiffs allege that defendants have prohibited them from engaging in certain conduct while expressly allowing others in the employ of a "commercial employer" to engage in identical conduct, in violation of plaintiffs' right to equal protection of the law under the *Fourteenth Amendment*. In Count VII, plaintiff Strasburg alleges that defendants' acts have interfered with his business without legal justification or governmental privilege, causing injury to the business.

Plaintiffs request temporary and permanent injunctive relief restraining defendants and their agents from carrying out any of the policies and practices having the effect of continuing or renewing the violations alleged in the

complaint; from imposing any sanction against plaintiff Strasburg or any members of the State Bar of Wisconsin grounded upon the plaintiffs conduct of his business; from executing any criminal complaint against plaintiff Strasburg or taking any action with the object of obtaining a criminal prosecution of plaintiff Strasburg for unauthorized practice of law for the conduct of business as described in the Complaint; and from executing any contempt citation or affidavit in support thereof and taking any action to procure or urge a contempt citation in connection with any conduct of business as described in the complaint. Plaintiffs seek compensatory damages, treble damages as provided under the Clayton Act, reasonable attorney's fees, and a declaration that defendants have violated 15 *U.S.C.* Sec. 1, the *First*

and *Fourteenth* Amendments to the United States Constitution, 42 *C.F.R.* Secs. 431.206 and 435.908, and *Wis. Stat.* Secs. 133.034 and 134.01.

Defendants Supreme Court of the State of Wisconsin, the Board of Attorneys Professional Responsibility and Gerald C. Sternberg acting in his official capacity were dismissed from this case in an order dated April 9, 1991, because they were found to be immune from suit under the *Eleventh Amendment.* The case is now before the court on the motion for summary judgment of the remaining defendants. Defendants State Bar of Wisconsin and individual members of the Board of Attorneys Professional Responsibility assert that the complaint against them should be dismissed because they were not served

within 120 days of the filing of the cause of action. Plaintiffs do not contend otherwise. Defendant Sternberg, in his official capacity, moves to dismiss the cause of action against him on the bases of absolute quasi-judicial immunity and state action immunity. Plaintiffs argue only that defendant Sternberg should not be granted summary judgment on the ground of quasi-judicial immunity because there is a factual dispute about the role in which defendant Sternberg was acting as the administrator of the Board of Attorneys' Professional Responsibility.

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c); Celotex Corp. v.*

Catrett, 477 U.S. 317, 322 (1986); *Indiana Grocery, Inc. v. SuperValu Stores, Inc.*, 864 F.2d 1409, 1412 (7th Cir. 1989). When the moving party succeeds in showing the absence of a genuine issue as to any material fact, the opposing party must set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P.* 56 (e); *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *Bank Leumi Le-Israel, B.M. v. Lee*, 928 F.2d 232, 236 (7th Cir. 1991). The affirmative defense of absolute quasi-judicial immunity is appropriately considered by the court on summary judgment because it is an immunity from suit. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

I conclude that defendants State Bar

of Wisconsin and individual members of the Board of Attorneys Professional Responsibility are entitled to summary judgment because they were not served with process within 120 days of the filing of the complaint, as required by *Fed. R. Civ. P.* 4(j). I conclude also that summary judgment should be granted to defendants Sternberg; he is entitled to absolute quasi-judicial immunity because the acts he is alleged to have taken in violation of plaintiffs' rights are acts comprising lawful duties of an administrator of the Board of Attorneys Professional Responsibility.

For the purpose only of deciding defendants' motion for summary judgment, I find from the parties' proposed findings of fact that the following material facts are undisputed.

FACTS

Plaintiff John W. Strasburg is the principal shareholder and president of plaintiff, ElderCare Asset Protection Plans, Inc. Defendant Gerald C. Sternberg is the administrator of the Board of Attorneys Professional Responsibility, an agency of the Supreme Court of the State of Wisconsin.

In March of 1990, the Supreme Court of Wisconsin suspended plaintiff from the practice of law in Wisconsin for two years. *In the Matter of the Disciplinary Proceedings Against John W. Strasburg*, 154 Wis.2d 90, 452 N.W.2d 152 (1990). On March 23, 1990, defendant Sternberg wrote to plaintiff, telling him that he could no longer perform legal services or services that were related in any way to the legal work he had been doing in the

past. Defendant Sternberg referred specifically to the language of *SCR* 22.26(2), which prohibits attorneys under suspension from performing any work normally done by paralegals or law students. Sternberg stated specifically that plaintiff was prohibited from doing legal research or drafting legal forms, wills, trust documents, divestitures or doing any kind of financial planning that required legal expertise to qualify people for Title 19 funds. He added that "the Board may consider noncompliance with either the Court order or with the Supreme Court Rules to be an act in contempt of court and may proceed accordingly.... During the period of suspension, this agency continues to have jurisdiction over your conduct." In addition, defendant Sternberg stated that plaintiff should "avoid placing (himself)

in situations where members of the public or legal profession might construe that (he was) continuing to practice law."

As administrator of the Board of Attorneys Professional Responsibility, defendant Sternberg is required to "[i]nvestigate any possible misconduct....of an attorney and report his or her findings and recommendations to the board." *Wis. SCR* 21.02. This includes routine monitoring of lawyers who are under order of suspension by the Wisconsin supreme court, to determine whether they are complying with the court's suspension order. If a suspended lawyer is found to be in noncompliance, the administrator may inform the lawyer of this fact, or oppose a petition for reinstatement when one is filed. Shortly after plaintiffs suspension, defendant Sternberg received a letter from a board

member advising him that plaintiff was advertising services similar if not identical to those he had offered clients before his suspension: estate planning, asset protection, preparation of wills, trusts, and divestitures, and research into the changing rules and laws regarding Title 19.

Defendant Sternberg exchanged several letters with plaintiff Strasburg's attorney. The letters demonstrated a difference of opinion between defendant and plaintiff over the interpretation of Wis. SCR 22.26(2).[1]

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[1] 1 *Wis. SCR* 22.26(2) states that "(a) suspended or disbarred attorney may not engage in the practice of law or in any law work activity customarily done by law students, law clerks or other paralegal personnel, except that he or she may engage in law related work for a commercial employer not itself engaged in the practice of law."

Plaintiff Strasburg informed defendant Sternberg that he wanted to operate a company, ElderCare Asset Protection Plans, Inc, which would provide Title 19 estate planning for customers. The company would provide such services for customers through plaintiff Strasburg's appearance as an advocate at medical assistance hearings before the Department of Health and Social Services, as well as through the preparation of will and trust documents and the giving of Title 19 advice. Defendant Sternberg responded in his letter of August 28, 1990, that he did not believe that "the functions [contemplated by plaintiff can be separated in such a way as to keep Mr. Strasburg out of practicing law and solely in the realm of financial consultant if he operates ElderCare." In the same letter, defendant Sternberg

wrote: "That is not to say that Mr. Strasburg is prohibited from changing focuses entirely and functioning as a financial consultant or adviser in the traditional sense where legal advice, preparation for clients of documents requiring knowledge of legal principles not possessed by ordinary laypersons, and appearing as an advocate are not involved."

In response to defendant Sternberg's August 28 letter, plaintiffs attorney asked for Sternberg's interpretation of Wisconsin statutory and case law regarding the activities plaintiff wished to pursue in his business. Specifically, plaintiff sought clarification whether plaintiff could appear at hearings on behalf of clients before the Department of Health and Social Services, compute and estimate taxes, use forms such as

statutory wills and trusts, and dispense advice concerning the disposition of assets pursuant to Title 19. Plaintiffs view was that these were activities that did not constitute the unauthorized practice of law, and that he could do them without further sanction from the Board of Attorneys Professional Responsibility.

Defendant Sternberg wrote back again on October 10, 1990, stating that "it is my view" that plaintiff's "appearance at Department of Health and Social Services hearings, preparation of wills and trusts, and advice concerning disposition of assets.... are all proscribed" activities for suspended lawyers under Wisconsin case law. Further, he stated that I believe both the case law and *SCR* 22.26(2) would prohibit Mr. Strasburg's operation of Eldercare Asset Protection

Plans if that operation includes the type of work set forth in your [previous memorandum and letter]".

OPINION

I. DEFENDANTS STATE BAR OF WISCONSIN AND INDIVIDUAL MEMBERS OF THE BOARD OF ATTORNEYS PROFESSIONAL RESPONSIBILITY

These defendants move to dismiss the complaint against them because they were not served with process within 120 days of the filing of the complaint. *Fed. R. Civ. P.* 4(j) provides that

> "[i]f a service of the summons and complaint is not made within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be

discussed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion."

The complaint was filed on January 3, 1991; the rule required service on defendants by May 3, 1991. In the May 6, 1991 pretrial conference order, I noted that defendants other than Sternberg had not been served. Plaintiffs did not attempt to show good cause at that time why service had not been made, and have not done so in response to the present motion to discuss. Therefore, the motion to dismiss of defendants State Bar of Wisconsin and all individual members of the Board of Attorneys Professional Responsibility except for Sternberg will be granted.

II. DEFENDANT STERNBERG

Absolute immunity is an entitlement to immunity from suit, rather than a defense to liability; it is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. at 526. "Absolute immunity defeats the suit at the outset so long as the official's actions were within the scope of the immunity." *Imbler v. Pachtman*, 424 U.S. 409, 419, n.13 (1976). The question of immunity is a question of law for the court, not for the jury. *Alvarado v. Picur*, 859 F.2d 448, 451 (7th Cir. 1988).

Absolute immunity has been recognized soaringly by the federal courts. *Burns v. Reed*, 111 S.Ct. 1934, 1935 (1991) (noting that "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the

exercise of their duties"). However, "judges and other officials functionally comparable to judges have long enjoyed absolute immunity from liability for damages." *Eisenberg v. Sternberg*, 641 F.Supp. 620, 625 (W.D. Wis. 1986) (citing *Butz v. Economou*, 438 U.S. 478, 496 (1978). Prosecutors have been held to perform a "quasi-judicial" function, entitling them to the same absolute immunity as judges when their activities are "intimately associated with the judicial phase of the criminal process." *Id.* Two courts of appeals have held that bar officials charged with the duties of investigating, drawing up, and presenting cases involving attorney discipline are in quasi-judicial positions analogous to prosecutors, and therefore are entitled to absolute immunity from damages claims for performing those functions. *Kissell*

v. Breskow, 579 F.2d 425, 428-30 (7th Cir. 1978); *Clulow v. State of Oklahoma*, 700 F.2d 1291, 1298 (10th Cit. 10983).

In *Eisenberg v. Sternberg*, 641 F. Supp. at 620, 626, this court found that in Wisconsin, the administrator of the Board of Attorneys Professional Responsibility serves as an arm of the court and performs functions that belong to the judiciary. "The judicial nature of the work and the similarity of the work to that of a prosecutor and grand jury point to a finding that they are functionally comparable to these quasi-judicial entities," and so are deserving of absolute immunity. *Id.* For instance, the administrator is appointed by the Board of Attorneys Professional Responsibility to "investigate possible misconduct and report findings and

recommendations to the Board" *Id.*

The absolute immunity of a prosecutor has been curtailed somewhat. In *Burns v. Reed*, 111 S.Ct. at 1939, the Supreme Court held that although prosecutors have only qualified immunity in their roles as administrators or investigating officers, they have absolute immunity for conduct in initiating a prosecution and in presenting the state's case. The Court held that a prosecutor had absolute immunity for conduct in a probable cause hearing where he was appearing before a judge and presenting evidence in support of a motion for a search warrant, because his actions involved his rule as an advocate for the state. *Id.* at 1942. However, he or she had only qualified immunity in the role of providing legal advice to the police. *Id.* at 1944. In

determining which kind of immunity attached to a particular act, the proper inquiry is "whether the prosecutor's actions are closely associated with the judicial process." *Id.*

Plaintiffs contend that a factual dispute exists whether defendant Sternberg was investigating a case involving lawyer discipline, which would entitle him to absolute quasijudicial immunity, or whether he was advising plaintiff about activities he could pursue during his suspension, which plaintiff contends would not entitle defendant to quasi-judicial immunity. Although plaintiff bases his entire and incomplete argument on his characterization of the question as a factual dispute, the question of which type of immunity attaches to defendant Strasburg [sic] is not a question of fact

but rather a question of law for the court to determine, and thus appropriate for summary judgment. *Alvarado v. Picur*, 859 F.2d at 451.

In the order and opinion of April 9, 1991, I withheld a grant of absolute quasi-judicial immunity to defendant Sternberg because

> "[p]laintiffs contend that defendant Sternberg is not entitled to this immunity when his action is not one of 'investigating, drawing up, and presenting cases involving attorney discipline" Because it is possible to construe the complaint as alleging that defendant Sternberg is using Rule 22.26 to interfere with plaintiffs' business for improper reasons having nothing to do with his lawful duties as administrator of the Board, I will

deny defendants' motion to dismiss the complaint against defendant Sternberg on the ground of judicial immunity."

It is explicit in this holding, and uncontested by plaintiffs that defendant Sternberg is eligible for quasi-judicial immunity if he was "investigating, drawing up, or presenting a case involving attorney discipline." The question is whether the undisputed facts establish that the challenged acts of defendant Sternberg fall into this category of prosecutorial activity.

It is part of defendant Sternberg's responsibilities as administrator of the Board of Attorneys Professional Responsibility to "[i]nvestigate any possible misconduct.... of an attorney and report his or her findings and recommendations to the Board." *SCR* 21.02

This includes routine monitoring of lawyers who are under order of suspension by the Wisconsin supreme court, to determine whether they are complying with the court's suspension order. If a suspended lawyer is found to be in noncompliance, the administrator may inform the lawyer of this fact, or oppose a petition for reinstatement when one is filed.

At the time of the events leading to this lawsuit, plaintiff had been suspended very recently from the practice of law. There were several things he was required to do to comply with the terms of his suspension. See *SCR* 22.26. Plaintiff had been directed to close his law offices and to discontinue performing legal services or services related in any way to the legal work he had done in the past. Shortly thereafter, defendant

Sternberg received a letter from a board employee, informing him that plaintiff was advertising services that seemed similar to what he had been doing as lawyer: estate planning, asset protection, preparation of wills, trusts and divestitures, and legal research into the changing rules and laws regarding Title 19. These activities were related, if not identical, to the work plaintiff had been doing prior to his suspension, and the type of work done in law offices by paralegals, law students, and lawyers. Further, plaintiff informed defendant Sternberg that he was intending to represent a client before the Department of Health and Social Services at a medical assistance hearing, representation precluded by both Wisconsin case law and supreme court rule. See *State ex rel. State Bar v.*

Keller, 16 Wis.2d 377, (1962), *vacated and remanded on other grounds* 374 U.S. 102 (1963), 21 Wis.2d 100, 104 (1963); *SCR* 22.26(2).

When faced with the report of what plaintiff might be doing and intending to do while under suspension, defendant had to make a decision similar to one a prosecutor would make. He had to decide whether plaintiff was in contravention of the rules governing his activities while his license was suspended. If plaintiff was in noncompliance, defendant Sternberg had an obligation to report such activity to the supreme court. Rather than acting outside his legal duties, as plaintiff contends, defendant Sternberg was doing specifically what his job required him to do: investigating the conduct of a suspended lawyer, a case involving lawyer discipline. Quasi-judicial immunity

applies to defendant Sternberg in the exercise of these duties.

Plaintiff asserts that defendant Sternberg was not acting in his quasi-judicial role of investigating lawyer conduct, but rather, like the prosecutor in *Burns*, was advising plaintiff about the activities he could pursue in his business, a role not covered by quasi-judicial immunity. However, the prosecutor in Burns was acting as the attorney for the police department when he gave them advice. Defendant Sternberg was not acting as plaintiff's attorney in this case. Indeed, his correspondence was with plaintiff's attorney. Defendant Sternberg was not advising plaintiff about what plaintiff should do, he was informing him of his opinion of what would constitute noncompliance with

plaintiff's suspension order, and the standard upon which further possible action against plaintiff might be taken. This left plaintiff free to decide, in consultation with his attorney, whether to continue with his plans.

A consideration of the purpose of absolute judicial immunity underscores the propriety of extending the immunity to defendant Sternberg in this case. Absolute immunity extends to judges "for the benefit of the public, whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences." *Pierson v. Ray*, 386 U.S. 547, 554 (1967). "Extending such immunity to the Board and its administrator serves the same purpose. It helps ensure that the administrator and board will act vigorously to protect

the public from incompetent, impaired, or unethical lawyers." *Eisenberg v. Sternberg*, 641 F. Supp. at 626.

Plaintiff advertised that he was continuing many of the services he had offered his clients prior to his suspension. He submitted a memo to the board detailing services he intended to offer his clients, He informed the board that he intended to represent a client before an administrative agency. Defendant Sternberg's job required him to investigate plaintiff's activities in order to protect the public, especially when plaintiff planned to engage in exactly the same activities he had been pursuing when he was sanctioned for misconduct.

Plaintiff offers no evidence whatsoever that defendant Sternberg was acting outside his official role as

administration of the board, a role that required him to determine when to "bring charges" that plaintiff was violating the conditions of his suspension. The fact that defendant Sternberg communicated with plaintiff regarding the point at which the board would consider that plaintiff was in noncompliance does not alter the fact that defendant Sternberg was investigating plaintiff's possible misconduct during suspension. As defendant Sternberg was investigating a case involving lawyer discipline, he is entitled to absolute quasi-judicial immunity.

ORDER

IT IS ORDERED that defendants' motion for summary judgment is GRANTED and this case is DISMISSED with prejudice

with respect to defendant Gerald C. Sternberg, in his individual capacity, and without prejudice with respect to the remaining defendants. If plaintiffs believe they have viable claims against these defendants, they may have until December 15, 1991 in which to refile the action and accomplish service. If plaintiffs do not do so, the dismissal of the complaint against remaining defendants will be amended to be with prejudice, and final judgment will be entered in favor of all defendants.

Entered this 15th day of November, 1991.

BY THE COURT:

s/_____

BARBARA B. CRABB

District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN W. STRASBURG, and
ELDERCARE ASSET PROTECTION
PLANS, INCORPORATED,

Plaintiffs,

ORDER

v.

91-C-018-C

STATE BAR OF WISCONSIN,
BOARD OF ATTORNEYS PROFESSIONAL
RESPONSIBILITY, GERALD C. STERNBERG,
JOHN A. BOLZ, JOHN E. SHANNON,
EDMUND MANYDEEDS, III, JACQUELINE
BOHMAN, WILBUR W. WARREN III,
MICHAEL WHERRY, MICHAEL FAUERBACH,
LISA LOTTE GAMELTOFT, PATRICIA
GROVE, ROBERT J. KAY, CELIA SERAPHIM,
DIANE ZORE, AND THE SUPREME COURT
OF THE STATE OF WISCONSIN,

Defendants.

A preliminary pretrial conference was held in this case on May 2, 1991, before United States District Judge Barbara B. Crabb. Plaintiffs appeared by Stephen Crocker. Warren Weinstein

appeared for defendant Gerald C. Sternberg. The remaining defendants have not been served.

This case is set for jury trial during the week beginning September 3, 1991. Counsel estimate the case will take two to three days to try.

A final pretrial conference will be held on August 29, 1991 at 4:00 p.m. (A copy of the final pretrial order is enclosed.)

Plaintiffs may have until May 10, 1991 in which to move for clarification of the order entered April 10, 1991. Defendant may have until May 17, 1991 in which to oppose the motion.

Any amendments to the pleadings are to be filed and served by June 10, 1991. NOTE: Before filing a proposed amended complaint, counsel shall attempt to obtain opposing counsel's agreement to

the filing of the proposed amendment. If counsel is unable to obtain opposing counsel's consent to the amendment, the proposed amendment must be accompanied by a motion for leave to amend along with a statement that counsel has been unable to obtain opposing counsel's consent.

All discovery in the case is to be completed on or before August 30, 1991. The names, addresses and general subject matter of testimony of all expert witnesses to be called at trial are to be disclosed by plaintiffs no later than June 24, 1991, and by defendant no later than July 8, 1991. As to any expert witnesses named, the parties are to provide opposing parties with copies of any reports prepared by such experts at the time the expert is disclosed and thereafter make the expert available for deposition. The names, addresses, and

general subject matter of testimony of all lay witnesses are to be disclosed by plaintiffs no later than July 22, 1991, and by defendant no later than July 29, 1991.

Counsel are reminded to work together in scheduling all discovery so as to accommodate each other's schedules and to avoid unnecessary discovery disputes.

On or before July 8, 1991, each lawyer is to send Joseph Skupniewitz, United States Magistrate Judge, a written statement of the terms upon which his or her client would agree to settlement of the case. Any submission regarding settlement should be in an envelope clearly marked "CONFIDENTIAL," and will not become part of the public file. (The statement need not be sent to opposing counsel.) Upon receipt of the statements,

Mr. Skupniewitz will initiate discussions with counsel concerning settlement.

All dispositive motions are to be served and filed with supporting briefs no later than July 15, 1991. The opposing party may have until August 1, 1991, in which to serve and file a brief in opposition. The moving party may have until August 8, 1991, in which to serve and file a reply brief. If a motion for summary judgment is filed, the parties are to follow this court's *Procedures for the filing of Summary Judgment Motions*, a copy of which is attached.

Entered this 2nd day of May, 1991.

BY THE COURT:

_____

BARBARA B. CRABB

District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN W. STRASBURG, and
ELDERCARE ASSET PROTECTION
PLANS, INCORPORATED,

Plaintiffs,

v.

ORDER
91-C-018-C

STATE BAR OF WISCONSIN,
BOARD OF ATTORNEYS PROFESSIONAL
RESPONSIBILITY, GERALD C. STERNBERG,
JOHN A. BOLZ, JOHN E. SHANNON,
EDMUND MANYDEEDS, III, JACQUELINE
BOHMAN, WILBUR W. WARREN III,
MICHAEL WHERRY, MICHAEL FAUERBACH,
LISA LOTTE GAMELTOFT, PATRICIA
GROVE, ROBERT J. KAY, CELIA SERAPHIM,
DIANE ZORE, AND THE SUPREME COURT
OF THE STATE OF WISCONSIN,

Defendants.

Plaintiffs have moved for an adjournment of the trial date. The motion is granted. A scheduling conference will be held once the pending motion for summary judgment has been decided unless

resolution of the motion disposes of the entire case.

Entered this 5th day of August, 1991.

BY THE COURT:

_____

BARBARA B. CRABB

District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN W. STRASBURG, and
ELDERCARE ASSET PROTECTION
PLANS, INCORPORATED,

Plaintiffs,

v.

OPINION AND ORDER
91-C-018-C

STATE BAR OF WISCONSIN,
BOARD OF ATTORNEYS PROFESSIONAL
RESPONSIBILITY, GERALD C. STERNBERG,
JOHN A. BOLZ, JOHN E. SHANNON,
EDMUND MANYDEEDS, M JACQUELINE
BOHMAN, WILBUR W. WARREN III,
MICHAEL WHERRY, MICHAEL FAUERBACH,
LISA LOTTE GAMELTOFT, PATRICIA
GROVE, ROBERT J. KAY, CELIA SERAPHIM,
DIANE ZORE, AND THE SUPREME COURT
OF THE STATE OF WISCONSIN,

Defendants.

This is a civil suit for money damages and declaratory and injunctive relief Jurisdiction is asserted under 15 *U.S.C.* Secs. 1, 15, 26, and 28 *U.S.C* Secs. 1331, 1337 and 1343 and the

doctrines of pendent and supplemental jurisdiction. Plaintiffs allege that defendants have attempted to prevent them from engaging in activities that may be performed by non-lawyers on the ground that such activities constitute the practice of law, in violation of the terms of plaintiff Strasburg's two year suspension from practice.

Plaintiffs set forth seven counts of wrongdoing on defendants' part. In Count I they contend that defendants' prohibition of plaintiffs' representation of Medical Assistance recipients and applicants violates 42 *U.S.C.* Title 19 and the supremacy clause of the United States Constitution, unlawfully preventing plaintiffs from conducting legitimate business. In Count II, they allege that defendants have restrained trade in Milwaukee, the states of

Wisconsin and Illinois and elsewhere, and that in doing so, defendants have combined to restrict trade or commerce among the states in violation of Section 1 of the Sherman Act, 15 *U.S.C.* Sec. 1. In Count III, they allege that defendants have combined to restrict trade or commerce in violation of *Wis. Stat.*, Sec. 133.03(1) by preventing plaintiffs from conducting a legitimate business. In Count IV, plaintiffs allege that defendants have violated *Wis. Stat.*, Sec. 134.01 by combining for the purpose of willfully or viciously injuring plaintiffs in their reputation, trade or profession. In Count V, plaintiffs allege that defendants' conduct has prohibited plaintiffs from communicating freely with their customers and others in violation of the *First Amendment* to the

United States Constitution.

In Count VI, plaintiffs allege that defendants have prohibited plaintiffs from engaging in certain conduct while expressly allowing others in the employ of a "commercial employer" to engage in identical conduct, in violation of plaintiffs' right to equal protection of the law under the *Fourteenth Amendment*. In Count VII, plaintiffs allege that defendants' acts have interfered with plaintiffs' business without legal justification or governmental privilege causing injury to plaintiffs' business.

Plaintiffs request temporary and permanent injunctive relief restraining defendants and their agents from carrying out any of the policies and practices having the effect of continuing or renewing the violations alleged in the complaint; from imposing any sanction

against plaintiff Strasburg or any members of the State Bar of Wisconsin grounded upon the plaintiffs' conduct of his [sic] business; from executing any criminal complaint against plaintiff Strasburg or taking any action with the object of obtaining a criminal prosecution of plaintiff Strasburg for unauthorized practice of law for the conduct of business as described in the complaint; and from executing any contempt citation or affidavit in support thereof and taking any action to procure or urge a contempt citation in connection with any conduct of business as described in the complaint. Plaintiffs seek compensatory damages, treble damages as provided under the Clayton Act and reasonable attorney's fees, and a declaration that defendants have violated 15 *U.S.C. Sec.* 1, the *First and*

Fourteenth Amendments to the United States Constitution, 42 *C.F.R.* Secs. 431.206 and 435.908, and *Wis. Stat.* Secs. 133.034 and 134.01.

Defendants Supreme Court of the State of Wisconsin, the Board of Attorneys Professional Responsibility and Gerald C. Sternberg have moved for dismissal of the complaint on two grounds: 1) the court lacks jurisdiction because the constitutional issues raised in the complaint are intertwined inextricably with the review of a disciplinary order of the Supreme Court of the Supreme Court of the State of Wisconsin and the Eleventh Amendment bars the complaint against the state supreme court; and 2) the complaint fails to state a claim against the moving defendants who are insulated from both state and federal antitrust liability

under the "state action" doctrine, enjoy absolute judicial immunity, are not persons under 42 *U.S.C.* Sec. 1983, and, with respect to the defendant court, enjoy legislative immunity.

I ccnclude that this court lacks subject matter jurisdiction over the Board and the state supreme court because they are immune from suit under the *Eleventh Amendment* that the *Eleventh Amendment* also precludes an action against defendant Sternberg for money damages for acts done in his official capacity.

For the sole purpose of deciding the motions to dismiss, I find that the complaint fairly alleges the following against the moving defendants.

ALLEGATIONS OF COMPLAINT

Plaintiff John W. Strasburg is a resident of the State of Wisconsin engaged in business as the principal stockholder and president of plaintiff, ElderCare Asset Protection Plans, Inc, a for-profit corporation organized and existing under the laws of the State of Wisconsin with its principal place of business in Milwaukee, Wisconsin.

Defendant State Bar of Wisconsin is a business association, membership in which is compelled as a condition of obtaining and retaining a license to practice law in the State of Wisconsin.[1]

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[1] In their brief, plaintiffs state that membership in the State Bar of Wisconsin is voluntary at the present time, which casts doubt on the accuracy of this allegation that bar membership is a condition of practicing law in Wisconsin.

Defendant Supreme Court of Wisconsin is a governmental entity of the State of Wisconsin and is a body politic and corporate with principal offices in Madison, Wisconsin. Defendant Board of Attorneys Professional Responsibility is a governmental entity of the State of Wisconsin and is a body politic and corporate with principal offices in Madison, Wisconsin. Defendant Gerald C. Sternberg is a resident of Wisconsin and administrator of the defendant Board. The remaining individual defendants are residents of Wisconsin and members of the defendant Board. All of the defendants have acted, failed or refused to act under color of state law during all times relevant to this complaint, in that all their actions were taken or not taken under color and pretext of policies, procedures, acts, usages, and customs of

the State of Wisconsin.

While plaintiff Strasburg was a member of the State Bar of Wisconsin, he began to render services in the nature of medical assistance representation and advising and related financial planning to medical assistance recipients, applicants, and those contemplating medical assistance applications. Eventually, plaintiff Strasburg founded a corporation (plaintiff ElderCare), to provide Title 19 Medical Assistance planning, to make determinations of the availability of Title 19 benefits for particular customers and to advise customers on qualifications for such benefits. Plaintiff ElderCare also prepares applications for Medical Assistance benefits for customers and represents them at hearings and advises customers concerning the disposition of

assets in compliance with Medical Assistance legislation.

Services such as those that plaintiff ElderCare provides are provided by trust companies and financial planning companies, whose employees are not required to be members of the bar. Plaintiff ElderCare does not engage in the practice of law or accounting. Matters that would constitute the practice of law are referred to lawyers and those requiring accounting skills are referred to accountants. As trust companies do, plaintiff ElderCare provides recommendations of the types of trust services that would be available based upon the financial and personal needs of its customers. These include testamentary, living, revocable and irrevocable trusts. Plaintiff ElderCare computes and estimates taxes and

recommends tax reduction strategies to customers. Plaintiff ElderCare never custom drafts for its customers any documents other than Medical Assistance documents. It fills out preprinted forms authorized by statute or administrative rule or available commercially to the public or prepared by lawyers.

In a disciplinary action captioned "In the Matter of Disciplinary Proceedings against John W. Strasburg, Case No. 89-0457-D," defendant Board suspended plaintiff Strasburg's license to practice law for a two-year period, effective April 9, 1990. On March 23, 1990, defendant Sternberg wrote to plaintiff Strasburg, demanding that he not continue .... services that are in any way related to the legal work that you have been doing in the past", and cited *Supreme Court Rule* 22.26(2), which

provides, among other things, that a suspended lawyer may not engage in "any law work activity customarily done by law students, law clerks, or other paralegal personnel except that he or she may engage in law related work for a commercial employer not itself engaged in the Practice of Law." Sternberg added

> "In other words, we are informing you that contrary to the recent newspaper advertisements for your office, you are prohibited from doing paralegal work or research, legal forms, wills, trust documents, divestitures or any kind of financial planning to qualify people for Title 19 that requires legal expertise. Not only are you prohibited from doing any of this work, but other lawyers are prohibited by *SCR* 22.267 from

permitting you to perform this work during your suspension."

In the same letter defendant Sternberg threatened plaintiff Strasburg that his license to practice law would not be reinstated if he failed to submit to the restraints upon his trade and threatened both plaintiffs with contempt of court for failing to submit. In this manner, defendants threaten and intimidate practicing lawyers with disciplinary action if they engage in trade with plaintiffs, even if only as consultants to plaintiffs or plaintiffs' customers. Defendants' restraints upon plaintiffs' rights to conduct legitimate business will continue throughout plaintiff Strasburg's suspension period and will be permanent if he is not reinstated after the term has run.

In a letter dated August 28, 1990,

defendant Sternberg advised plaintiffs on behalf of the defendant Board that plaintiffs were precluded from engaging in their former activities and that conduct of business involving any such activities would constitute the unauthorized practice of law.[2]

Upon plaintiffs' information and belief, all of the individual defendants and officers and employees of the defendant entities communicated with each other concerning plaintiffs, their business, and the suspension of plaintiff Strasburg.

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[2] Although plaintiffs state that the two Sternberg letters are appended to their complaint as Exhibits A and B, the letters have not been submitted to the court.

OPINION

The threshold question is whether this court has authority to review the actions in dispute. Citing *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), defendants contend that review is barred because actions relating to the discipline of individual members of the bar are judicial actions of the state supreme court that can be reviewed only by the United States Supreme Court. In *Feldman*, the Supreme Court held that although the lower federal courts may entertain challenges to the constitutionality of state bar rules that are enacted by state courts in nonjudicial proceedings, the federal courts lack subject matter jurisdiction over complaints seeking review of state

court decisions denying applications for admission to the bar, even if the challengers contend that the state court's action is unconstitutional.

Plaintiffs contend that *Feldman* has no application to this case, because they are not contesting the state supreme court's decision to discipline plaintiff, only defendant Sternberg's actions based on his interpretation of *SCR* 22.26 as prohibiting plaintiffs from providing help to Medical Assistance recipients and applicants. So stated, plaintiffs' challenge seems to be one within this court's jurisdiction because it is a challenge to the constitutionality of the rule as applied. I would have no doubt about this conclusion were it not for the perplexing statement that plaintiffs make in their brief to the effect that they are not "challenging Rule 22.26."

Plaintiffs' Memorandum in Opposition to Motion to Dismiss, P. 19. I can understand that plaintiff might not wish to challenge Rule 22.26 on its face, but underlying all of plaintiffs' claims is the implicit proposition that Rule 22.26 is unconstitutional if it is applied to prohibit the performance of tasks that federal law specifically permits non-lawyers to perform. Plaintiffs may intend to allege that defendant Sternberg's interpretation of Rule 22.26 is such an unreasonable interpretation and so far beyond the bounds of any interpretation the state supreme court would give the rule that he does not share in any of the state's immunity to suit. A number of arguments in their brief leave the impression that this is the position they are taking. If so, it answers some questions about the theory

of their case but leaves unanswered some others, such as why the state supreme court is named as a defendant in the action and charged with combining with defendant Sternberg to cause injury to plaintiffs.

Because it is unclear, and because the litigation is only at an initial stage, I will assume that plaintiffs are challenging the constitutionality of Rule 22.26 as applied. Such a challenge is not beyond this court's jurisdiction. *Feldman* 460 U.S. at 487.

Defendants contend that even if this court has jurisdiction generally, to hear a challenge to Rule 22.26, the *Eleventh Amendment* deprives it of jurisdiction over the moving defendants, who are either entities of the state or, in the case of defendant Sternberg, a state official acting in his official capacity.

To the extent that the complaint seeks relief of any kind against the state supreme court and the Board for the violation of the federal constitution or federal and state laws, it is barred by the *Eleventh Amendment*, which prohibits suits brought against a state by one of its citizens. *Penhurst State Schools & Hosp. v. Halderman*, 465 U.S. 89, 98, 120 (1984) (principle of sovereign immunity is constitutional limitation of the federal judicial power established in Art. III that applies to pendent claims as well as well [sic] as to federal claims).

Plaintiffs do not contend that either the Board or the supreme court is not a part of the state for the purpose of determining the applicability of

sovereign immunity.[3]

They make only the cryptic allegation that, in taking the actions complained of, the Board and the Court were engaged in "proprietary conduct as a trade restraining business association." Complaint, pars. 8, 22. Plaintiffs do not explain the import of "proprietary conduct" in relation to the *Eleventh Amendment*. It may be that plaintiffs are attempting to bring their complaint under

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[3] According to the preamble of the *Supreme Court Rules, Wis. Stat.* ch. 21, the Board of Attorneys Professional Responsibility was established as an arm of the Supreme Court of Wisconsin to assist the court in the discharge of the court's responsibility to regulate the practice of law and to discipline members of the bar for professional misconduct. The Board has twelve members appointed by the court. *SCR* 21.01(4)(a). With the approval of the supreme court, it appoints a professional responsibility administrator whom it supervises in the performance of his or her duties. SCR 21.04(4)(b). Defendant Sternberg is the current administrator.

the holding in *Parden v. Terminal Railway Co.*, 377 U.S. 184 (1964), in which the Court held that when Congress conditions engagement in a regulated interstate enterprise to acceptance of a regulatory scheme, states that engage in that enterprise do not have the protection of sovereign immunity. This holding is premised on the presumption that in granting Congress the commerce power, the states agreed that Congress could subject them to suits in federal court arising out of their engagement in enterprises regulated by Congress in statutes such as the Fair Labor Standards Act. *Employees v. Missouri Public Health Dep't*, 411 U.S. 279, 301 (1973) (Brennan, J., dissenting). However, the holding in *Parden* has been limited to its facts. *Id.* at 285. More recent cases have made

it plain that waivers of state sovereign immunity will not be inferred from legislation; Congress must make its intention clear. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (requirement that Congress unequivocally express intention to override *Eleventh Amendment* ensures that federal courts can be certain of congressional intent to abrogate states' sovereign immunity). See also *Delmuth v. Muth*, _____ U.S. _____, 109 S.Ct. 2397, 2401 (1989) (congressional intent to abrogate immunity must be unmistakably clear in statute, otherwise rule of *Atascadero* not met.).

The statutes under which plaintiffs are proceeding, 42 *U.S.C.* Sec. 1983,15 *U.S.C.* Secs. 1, 15 and 26, contain no language from which an inference of

abrogation of state sovereign immunity could be drawn. See e.g., *Quern v. Jordan*, 440 U.S. 332, 342 (1979) (no support for "conclusion that Congress intended by the general language of the [Civil Rights Act of 1871] to overturn the constitutionally guaranteed immunity of the several states); *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("Sherman Act makes no mention of the state as such and gives no hint that it was intended to restrain state action or official action directed by a state"); *Laude Local Lines, Inc. v. Bi-State Development Agency of Missouri-Illinois Metropolitan Dist.*, 433 F.2d 131, 135 (8th Cir.1970) (antitrust laws do not apply to state government).

In the absence of any showing by plaintiffs why the Board and state supreme court are not immune from suit

under the *Eleventh Amendment*, defendants' motion to dismiss the complaint against these defendants will be granted.

To the extent that plaintiffs are suing defendant Sternberg in his official capacity for money damages, that action is barred as well. *Ford Motor Co. v. Dept. of Treasury*, 323 U.S. 459, 462 (1945) *(Eleventh Amendment* bars suit against state officer in his official capacity and constituting a action against the state). *Ex Parte Young*, 209 U.S. 123 (1908) permits federal court actions for money damages against state officials only when they are sued in their individual capacities for actions allegedly outside the scope of their duties. Although plaintiffs have not stated expressly that they are suing defendant Sternberg in his individual

capacity, a liberal reading of their allegations against him permit that inference to be drawn. Defendants' motion to dismiss for lack of subject matter jurisdiction will be denied with respect to defendant Sternberg except as to the claims for money damages made against him in his official capacity.

I turn next to the contention that defendant Sternberg is immune from federal antitrust liability under the state action doctrine set out in *Parker v. Brown*, 317 U.S. 341, which exempts from Sherman Act liability anticompetitive restraints imposed by the states or at their direction. Defendants point out that the state supreme court is the actor in any disciplinary action against a lawyer in Wisconsin: the administrator of the Board merely files a petition; it is the state supreme court

that makes the final determination of the discipline that is to be administered. Therefore, defendants contend, defendant Sternberg is only implementing the policy of the state supreme court and is entitled to the immunity provided under *Parker*.

Plaintiffs emphasize that they are not challenging the disciplinary action taken against plaintiff Strasburg, but defendant Sternberg's determination that *SCR* 22.26 prohibits plaintiffs from continuing their representation of medical assistance recipients. On the present record, I cannot say that this determination is derived from a command of the state so as to qualify for immunity under *Parker*. Defendant Sternberg's authority to advise suspended lawyers of the prohibitions on their activities during suspension is state-

derived, but it is a different question whether his interpretation of the prohibition can be said to be so derived in the absence of any definitive ruling by the state supreme court.

Defendant Sternberg makes the additional contention that he is absolutely immune from any claims for money damages even in his individual capacity because he is protected by the doctrine of judicial immunity, as a person performing functions associated closely with the judicial process. In *Eisenberg v. Sternberg*, 641 F.Supp. 620 (W.D. Wis. 1986), I held that the doctrine of judicial immunity extends to the administrator and the members of the Board of Attorneys Professional Responsibility when they are engaged in the investigation and presentment of cases involving the discipline of the

state's lawyers. In performing these functions that belong to the judiciary they are serving as an arm of the court, and are entitled to the same immunity the court would enjoy. *Id.* at 626.

Plaintiffs contend that defendant Sternberg is not entitled to this immunity when his action is not one of "investigating, drawing up and presenting cases involving attorney discipline." *Clulow v. State of Oklahoma*, 700 F.2d 1291 (10th Cir. 1983). Because it is possible to construe the complaint as alleging that defendant Sternberg is using Rule 22.26 to interfere with plaintiffs' business for improper reasons having nothing to do with his lawful duties as administrator of the Board, I will deny defendants' motion to dismiss the complaint against defendant Sternberg

on the ground of judicial immunity. *Cf Dacey v. New York County Lawyers' Ass'ti*, 423 F.2d 188 (2d Cir. 1969), *cert. denied*, 398 U.S. 929 (1970) (bar association has no immunity to a civil action arising out of its attempt to restrict the distribution of book on avoiding probate).

ORDER

IT IS ORDERED that defendants' motion to dismiss the complaint with respect to defendants Supreme Court of the State of Wisconsin and Board of Attorneys Professional Responsibility is GRANTED; defendants' motion to dismiss the complaint against defendant Sternberg is GRANTED as to plaintiffs' claims for money damages against this defendant in his official capacity; in all other

respects it is DENIED.

Entered this 9th day of April, 1991.

BY THE COURT:

S/_____

BARBARA B. CRABB

District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
August 12, 1993

HON. RICHARD D. CUDAHY, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. MICHAEL M. MIHM, Chief District Judge*

JOHN W. STRASBURG and ELDERCARE ASSET PROTECTION PLANS, INCORPORATED, Plaintiffs-Appellants,	)	Appeal from the United States District Court for the Western District of Wisconsin.
No. 91-3860 v.	)	No. 91 C 18 Barbara B Crabb, Judge
STATE BAR OF WISCONSIN, STERNBERG, JOHN A. BOLTZ, et al., Defendants-Appellees.	)	

ORDER

On consideration of the petition for rehearing any suggestion for rehearing *en banc* filed in the above-entitled cause on July 23, 1993, by plaintiffs-appellants,

no judge in active service has requested a vote thereon,** and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

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The Honorable Michael M. Mihm, Chief Judge of the Central District of Illinois, sitting by designation.

* The Honorable John L. Coffey, Circuit Judge, did not participate in the consideration or decision of this case.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN W. STRASBURG, and
ELDERCARE ASSET PROTECTION
PLANS, INCORPORATED,

Plaintiffs,

V.

ORDER
91-C-18-C

STATE BAR OF WISCONSIN,
BOARD OF ATTORNEYS PROFESSIONAL
RESPONSIBILITY, GERALD C. STERNBERG,
JOHN A. BOLZ, JOHN E. SHANNON, EDMUND
MANYDEEDS, III JACQUELINE BOHMAN, WILBUR
W. WARREN in, MICHAEL WHERRY, MICHAEL
FAUERBACH, LISA LOTTE GAMELTOFR,
PATRICIA GROVE, ROBERT J. KAY, CELIA
SERAPHIM, DIANE ZORE, AND THE SUPREME
COURT OF THE STATE OF WISCONSIN,

Defendants.

Plaintiffs have moved the court to vacate the order dated November 15, 1991, granting defendants' motion for summary judgment. Plaintiffs ask that the court rehear and reconsider the motion. In addition, plaintiffs ask for the opportunity to conduct discovery bearing

on the motion for summary judgment. At the same time, and inexplicably, plaintiffs have filed a notice of appeal.

The notice of appeal does not deprive the court of jurisdiction to consider the plaintiffs' motion to vacate because the notice is a nullity. First, there is no final judgment (or its equivalent) from which to take an appeal. Second, even if there were such a judgment, a notice of appeal has no effect if it is filed before the disposition of substantive postjudgment motions. *Fed. R. Civ. P.* 4(a)(4).

I turn then to the merits of plaintiffs' motions. Plaintiffs contend that the order entered herein on November 15, 1991 should be vacated so that the court may rehear and reconsider defendants' motion for summary judgment. Plaintiffs suggest three reasons for

reconsideration: that the court may not have considered the decision of the United States Supreme Court in *Hafer v. Melo*, 60 U.S.L.W. 4001 (November 5, 1991); that the court overlooked uncontroverted evidence in the record that defendant Sternberg rendered opinions on ElderCare's business activities and threatened plaintiffs with sanctions if they did not forbear from those activities; and that the court did not address the "indispensable" issue whether ElderCare's business conduct constituted the practice of law.

None of plaintiffs' arguments warrant vacating of the November 15 *order*. *Hafer v. Melo* concerned the distinction between personal-capacity and official-capacity suits brought under 42 *U.S.C* Sec. 1983. It did not address the

scope of immunities that may be available to persons sued in one or the other capacity, other than to hold that state officials may not claim the immunity of the *Eleventh Amendment when* they are sued in their personal capacities even for actions taken in their official capacities. Instead, the court noted that, except for very limited classes of officials, government officers are not immunized from personal liability for acts within their authority. "Rather, immunity from suits under Sec. 1983 is 'predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interest behind it,' *Imbler v. Pachtman*, 424 S. 409, 421 (1976)." *Hafer v. Melo*, 60 U.S.L.W. 4003. *Hafer* sheds no new light on the issues considered in the

November 15, 1991 opinion.

With respect to plaintiffs' other challenges to the November 15 opinion and order, only very limited discussion is necessary. I did not overlook the evidence in the record to which plaintiffs refer; in fact I discussed it in the opinion. See slip op. at 8-10, 16-17. Contrary to plaintiffs' contention, it was not necessary to decide whether ElderCare's business conduct constituted the practice of law in order to decide the motion. A prosecutor does not act outside his investigatory capacity merely because he investigates activity that is determined later to be legal or permissible.

Because I decline to vacate the November 15 order, I will deny plaintiffs' request to take a deposition of defendant Sternberg.

Plaintiffs raise one more matter, relating to the final paragraph of the November 15 order in which I advised plaintiffs that "if they believe they have available claims against (the defendants that have not yet been served in this action), they may have until December 15, 1991 in which to refile the action and accomplish service." Slip op. at 18-19. Plaintiffs have not complied with this order. On December 16, 1991, they filed a motion to have the court "consider this motion as a refiling of their complaint in this matter and to permit service upon the remaining defendants." They have not filed any evidence of service upon any of the defendants who had not been served as of November 15. Therefore, I will take the action I advised them I would take and dismiss the complaint as the remaining

defendants with prejudice and enter final judgment for the defendants.

ORDER

IT IS ORDERED that plaintiffs motion to vacate the order of November 15, 1991 granting summary judgment to defendant Gerald Sternberg is DENIED; plaintiffs' request to take the deposition of Sternberg is DENIED; the complaint is dismissed with prejudice with respect to all of the defendants and as to defendant Gerald Sternberg with respect to plaintiffs' claims for monetary damages against him in his official capacity; and the Clerk of Court is directed to enter judgment for all defendants.

Entered this 27th day of December, 1991.

BY THE COURT:

Barbara B. Crabb

District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN W. STRASBURG, and
ELDERCARE ASSET PROTECTION
PLANS, INCORPORATED,

Plaintiffs,

V.

ORDER
91-C-018-C

STATE BAR OF WISCONSIN,
BOARD OF ATTORNEYS PROFESSIONAL
RESPONSIBILITY, GERALD C. STERNBERG,
JOHN A. BOLZ, JOHN E. SHANNON, EDMUND
MANYDEEDS, III JACQUELINE BOHMAN, WILBUR
W. WARREN III, MICHAEL WHERRY, MICHAEL
FAUERBACH, LISA LOTTE GAMELTOFT,
PATRICIA GROVE, ROBERT J. KAY, CELIA
SERAPHIM, DIANE ZORE, AND THE SUPREME
COURT OF THE STATE OF WISCONSIN,

Defendants.

Plaintiffs have filed a motion for reconsideration of the order entered herein on April 9, 1991, in which I discussed the complaint in this case against defendants Board of Attorneys Professional Responsibility and Supreme

Court of the State of Wisconsin, and dismissed plaintiffs' claim for money damages against defendant Gerald C. Sternberg in his official capacity. Plaintiffs have supported their motion with a brief. Having reviewed the motion and the brief and defendants' brief in opposition to the motion, I am not persuaded that there is any reason to reconsider the April 9 decision.

ORDER

IT IS ORDERED that plaintiffs' motion for reconsideration of the order entered herein on April 9, 1991 is DENIED.

Entered this 10th day of June, 1991.

BY THE COURT:

_____

BARBARA B. CRABB

District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: July 9, 1993

BEFORE: Honorable Richard D. Cudahy,
Circuit Judge
Honorable Joel M. Flaum, Circuit
Judge
Honorable Michael M. Mihm, Chief
District Judge*

No. 91-3860

JOHN STRASBURG and ELDERCARE ASSET PROTECTION PLANS, INCORPORATED,
Plaintiffs-Appellants

v.

STATE BAR OF WISCONSIN, GERALD C. STERNBERG, JOHN A. BOLTZ, et al.,
Defendants-Appellees

Appeal from the United States District Court
for the Western District of Wisconsin
No. 91 C 18, Barbara B. Crabb, Chief Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

* The Honorable Michael M. Mihm, Chief Judge of the Central District of Illinois, sitting by designation.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that this appeal is DISMISSED for want of jurisdiction, with costs, in accordance with the decision of this court entered this date.

(1061-051993)

United States District Court

Western District of Wisconsin

Case Title:	Docket number
John W. Strasburg, et al.,	91-C-18-C
Plaintiffs,	Dec. 30, 1991
v.	Name of Judge or Magistrate
State Bar of Wisconsin, et al.,	Barbara B. Crabb
Defendants.	

(inapposite pre-printed parts of original omitted)

....Decision by Court. This action has come on for consideration by the Court with the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The defendant's motion for summary judgment is granted and judgment is entered in favor of all defendants dismissing plaintiff's complaint with prejudice with respect to all of the defendants and as to defendant Gerald Sternberg with respect to plaintiff's claim for money damages against him in his official capacity.

Copy of this document has been provided to Attorneys Cannon & Weinstein this 30th day of Dec., 1991

By: S. Richter, Deputy Clerk

Date: December 30, 1991

Clerk: s/Joseph W. Skupniewitz